



PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of:
MARTIN BRADY and
ANTHONY V. CRUZ

Serial No.: 09/228,109

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Docket No.: 0166 Art Unit: 3724

For: HOUSEHOLD KITCHEN OPENING APPLIANCE

Commissioner for Patents
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APPELLANTS' BRIEF

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I. Real Party in Interest

The real party in interest is Hamilton Beach Brands, Inc., which has a principal place of business in Glen Allen, Virginia.

II. Related Appeals and Interferences

In an earlier appeal, Ex Parte Martin Brady, Appeal No. 2001-1477, this Board rendered a decision on May 20, 2002, reversing an examiner's action finally rejecting claim 10 under 35 U.S.C. 102(b) (two separate rejections) and claims 10-13 under 35 U.S.C. 103(a). A Request for Rehearing was granted August 25, 2002, involving the language of claims 10 and 13.

Following the Board's decision of May 20, 2002, continued prosecution included the filing of five Notices of Appeal, each followed by reopening of prosecution by the examiner, before the filing of the Notice of Appeal which initiated the instant appeal.

On July 25, 2007, a Petition to Withdraw Examiner's Objection to Drawings was filed. The Petition was dismissed on 25, 2007, on the grounds that the objection to the drawings was appealable because the correctness of the objection and a rejection of claims depend on the same issue.

There are no other appeals or interferences related to the instant appeal or that will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

III. Status of Claims

A total of 15 claims have been submitted. Of these, claims 1, 2 and 6 have been canceled, claims 4, 5, 8, 9, 14 and 15 allowed, and claims 3, 7 and 10-13 finally rejected.

All finally rejected claims, numbers 3, 7 and 10-13, are appealed.

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IV. Status of Amendments

No amendments have been filed subsequent to the final rejection from which this appeal is taken.

V. Summary of Claimed Subject Matter

Independent Claims

The claims on appeal include five independent claims, numbers 3, 7 and 10.

Summary of Claim 3

Claim 3 recites a household opening appliance comprising an electric can opener having a housing, a jar opener mounted on a bottom wall of said housing, a sheath for a scissors, and a scissors holder within said sheath.

With reference to FIG. 1, household opening appliance 10 includes a housing 16 that carries a can opener assembly 18. (Page 4, lines 6-8) The housing 16 comprises a front portion 20 and a rear portion 22 mated together to partially enclose and carry the can opener assembly 18. (Page 4, lines 8-13) Front portion 20 and rear portion 22 of the housing 16 cooperate to define a front wall 23A, a rear wall 23B, two side walls 23C, and a bottom wall 23D. (Page 4, lines 13-15)

A jar opener, generally designated 70, mounted on the bottom wall 23D of the housing 16, includes a pair of elongate stainless steel plates 74 and 76 which extend at an acute angle outwardly

from the rear to the front of the bottom wall 23D. (Page 6, lines 2-7). The plates 74 and 76 are clamped to respective support pads 78 and 80 formed on the housing bottom wall 23D by respective clamp plates 82 and 84. (Page 6, lines 7-9) The steel plate 76 has a series of saw teeth 86 along its exposed edge for gripping the edge of a jar lid. (Page 6, lines 9-11) As evident, and as indicated by phantom lines in FIG. 6, a jar (not shown) with a lid 90, may be pressed upwardly against the housing bottom wall 23D and rearwardly into firm engagement with the stainless steel strips 76 and 78 and then rotated to loosen the lid 90. (Page 6, lines 11-15)

Referring to FIGS. 3 and 6, the appliance 10 has a downwardly-open, vertically-extending, scissors-receiving sheath, generally designated 50, for a scissors, such as scissors 52. (Page 5, lines 14-18) The sheath 50 is formed by the rear wall 23B of the housing 16 and a cover member 54 connected to the rear wall 23 by screws 56. (Page 5, lines 18-20)

A scissors holder or clamp 58 comprising a pair of cooperating spring metal clamp members 60 and 62, mounted by screws 64 respectively on the housing rear wall 23B and the cover member 54, releasably retains the scissors 52 within the sheath 50 when the scissors 52 is inserted upwardly from below the

appliance 10. (Page 5, line 20 to Page 6, line 1)

Summary of Claim 7

Claim 7 recites a household opening appliance comprising an electric can opener having a housing, a sheath for a scissors on a back of said housing, and a scissors holder within said sheath.

With reference to FIG. 1, household opening appliance 10 includes a housing 16 that carries a can opener assembly 18. (Page 4, lines 6-8) The housing 16 comprises a front portion 20 and a rear portion 22 mated together to partially enclose and carry the can opener assembly 18. (Page 4, lines 8-13) Front portion 20 and rear portion 22 of the housing 16 cooperate to define a front wall 23A, a rear wall 23B, two side walls 23C, and a bottom wall 23D. (Page 4, lines 13-15)

Referring to FIGS. 3 and 6, the appliance 10 has a downwardly-open, vertically-extending, scissors-receiving sheath, generally designated 50, for a scissors, such as scissors 52. (Page 5, lines 14-18) The sheath 50 is formed by the rear wall 23B of the housing 16 and a cover member 54 connected to the rear wall 23 by screws 56. (Page 5, lines 18-20)

A scissors holder or clamp 58 comprising a pair of cooperating spring metal clamp members 60 and 62, mounted by

screws 64 respectively on the housing rear wall 23B and the cover member 54, releasably retains the scissors 52 within the sheath 50 when the scissors 52 is inserted upwardly from below the appliance 10. (Page 5, line 20 to page 6, line 1)

Summary of Claim 10

Claim 10 recites a household opening appliance comprising an electric can opener having a housing and a scissors holder on said housing capable of releasably retaining a scissors on said housing.

With reference to FIG. 1, household opening appliance 10 includes a housing 16 that carries a can opener assembly 18. (Page 4, lines 6-8) The housing 16 comprises a front portion 20 and a rear portion 22 mated together to partially enclose and carry the can opener assembly 18. (Page 4, lines 8-13) Front portion 20 and rear portion 22 of the housing 16 cooperate to define a front wall 23A, a rear wall 23B, two side walls 23C, and a bottom wall 23D. (Page 4, lines 13-15)

A scissors holder or clamp 58 comprising a pair of cooperating spring metal clamp members 60 and 62, mounted by screws 64 respectively on the housing rear wall 23B and a cover member 54, releasably retains the scissors 52 within the sheath

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50 when the scissors 52 is inserted upwardly from below the
appliance 10. (Page 5, line 20 to Page 6, line 1)

VI. Grounds of Objection and Rejection to be Reviewed on Appeal

Following are the grounds of objection and rejection to be reviewed on appeal.

A. The objection to the drawings because they do not show the structure deemed by the examiner to be required by claims 11 and 13.

B. The rejection of claims 11 and 13 as unpatentable under 35 U.S.C. 112, second paragraph, for being indefinite for failing to particularly point out and distinctly claim the subject matter which appellants regard as the invention should be reversed.

D. The rejection of claims 3, 7 and 10 through 13 as unpatentable under 35 U.S.C. §103(a) over a manual titled "PRESTO Under Cabinet Automatic Can Opener Plus" (National Presto Industries, Inc. 1989), (called "PRESTO" by the examiner and hereafter), in view of United States Patent No. 4,152,831, to Davies and United States Patent No. 5,791,608 to Nielsen et al. and with evidence patents, United States Patent No. 5,494,176, to Zallo and United States Patent No. 2,720,189, to Newman.

E. The rejection of claims 3, 7 and 10 through 13 as unpatentable under 35 U.S.C. §103(a) over a manual titled "PRESTO Under Cabinet Automatic Can Opener Plus" (National Presto

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Industries, Inc. 1989), in view of United States Patent No.
2,720,189, to Newman.

D. The rejection of claim 10 of this application as
unpatentable under 35 U.S.C. §103(a) over a manual titled "PRESTO
Under Cabinet Automatic Can Opener Plus" (National Presto
Industries, Inc. 1989), in view of United States Patent No.
6,253,662 to Zelson.

VII. Argument

A. The objection to the drawings because they do not show structure which the examiner perceives to be required by claims 11 and 13 should be withdrawn.

The drawing objection is occasioned by the examiner's view that the recitation in claims 11 and 13 of "a sheath for a scissors on said housing" is not shown in the drawings. The sheath is element 50 and is formed in part by the back wall of the housing and, according to the examiner, cannot be "on said housing" if it is formed in part by said housing. As discussed below in the discussion of the rejection of claims 11 and 13 because of claim language quoted above, there is nothing inconsistent about reciting that a sheath is on the housing when the sheath is formed in part by a portion of the housing. Thus, the sheath is located on the housing whether or not it includes part of the housing.

One may ask: "Where is the sheath for the scissors?" And receive the following answer: "Over there on the can opener housing." The objection to the drawing is not well founded and should be withdrawn.

B. The rejection of claims 11 and 13 as unpatentable under 35 U.S.C. 112, second paragraph, for being indefinite for failing to particularly point out and distinctly claim the subject matter which appellants regard as the invention should be reversed.

Claims 11 and 13 are both dependent on independent claim 10. Independent claim 10 recites "a can opener [16, 18] having a housing [16]." Each dependent claim 11 and 13 recites "a sheath [50] for a scissors on said housing." (Reference numbers added)

The examiner asserts the quoted language renders claims 11 and 13 indefinite, arguing that the sheath cannot be "on the housing" because the sheath includes part of the back wall of the housing.

Thus, the key question is whether it is appropriate to recite "a sheath on said housing for a scissors" when the disclosed sheath includes the back wall of the housing. The examiner equates the "back of the housing" with the "back wall of the housing," and argues that the back wall of the housing cannot be "on" the housing. The examiner's position is evident from the following sentence appearing on page 3 of the final rejection: "Basically, the back wall of the housing, which makes up part of the sheath, cannot be on the back of the housing when they are in

fact the same item."

The examiner's reasoning is faulty. A recitation to the effect that the sheath is "on the housing" locates the sheath. That the disclosed embodiment comprises a sheath formed by the back wall of said housing and a cover member connected to said back wall is simply a disclosure of a particular construction of a sheath on the housing. One may ask: "Where is the sheath for the scissors?" And receive the following answer: "Over there on the can opener housing." Thus, there is nothing inconsistent in the claim recitations which the examiner finds to be in violation of 35 U.S.C. 112, second paragraph.

The standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope. In re Warmerdam, 33 F.3d 1354, 1360, 31 USPQ2d 1754, 1759 (Fed. Cir. 1994). Whether a claim is invalid for indefiniteness requires a determination whether those skilled in the art would understand what is claimed when the claim is read in the light of the specification. Orthokinetics Inc. v. Safety Travel Chairs Inc., 806 F.2d 1565, 1576, 1 USPQ2d 1081, 1088 (Fed. Cir. 1986). Obviously in this case those skilled in the art would understand what is claimed.

Counsel observes that claims 11 and 13 now rejected as

indefinite were allowed by the decision by this Board in Ex Parte Martin Brady dated May 20, 2002, in Appeal No. 2001-1477, with no indication of the confusion the examiner now alleges. It is submitted that is because there is no confusion between "the back of the housing" and the "back wall of the housing," the former identifying a location, the latter specifying structure at that location. The claims are straight forward and have not and would not prevent those skilled in the art from understanding what is claimed when read in the light of the specification. -

In view of the foregoing remarks and the applicable law, the rejection of claims 11 and 13 under 35 U.S.C. 112, second paragraph, should be reversed.

C. Claims 3, 7 and 10 through 13 of this application are not unpatentable under 35 U.S.C. §103(a) over a manual titled "PRESTO Under Cabinet Automatic Can Opener Plus" (National Presto Industries, Inc. 1989), in view of United States Patent No. 4,152,831, to Davies and United States Patent No. 5,791,608 to Nielsen et al. with reference also to "evidence patents", United States Patent No. 5,494,176 to Zallo and United States Patent No. 2,720,189.

1. The Prior Art.

The primary reference is the Presto manual, also identified in the record of this application as "Ref. AU," titled "Under Cabinet Automatic Can Opener Plus," and hereafter called "Presto." Among other things, Presto describes and shows the operation of a jar opener recessed in the bottom of a can opener housing. See page 8 and Fig. J of Presto, which shows an electric can opener for domestic use having a jar opener.

The secondary references are United States Patent No. 4,152,831, granted to Davies on May 8, 1979, and United States Patent No. 5,791,608, granted to Nielsen et al. on August 11, 1998.

Of the two secondary references, Davies patent 4,152,831,

shows a tool holder that relies upon a bias produced by springs that force the blades of a tool open to releasably retain the tool in the tool holder. (In FIG. 16, the springs bias the tool's handles instead of the blades.) The blades may be covered by a cover 6. Beginning at column 2, line 15, Davies states that the tool holder shown in FIGS. 1-13 "is capable of either sitting on a horizontal surface by its mounting portion 1, which in that version is a simple planar surface, or being mounted to a vertical surface, e.g. by means of a contact adhesive, by magnetic strips incorporated in the rear surface 1 or by means of screws which may pass through the holes 10 and 11." Later at column 3, lines 15-20, Davies refers to the holder being "wall mounted" and at column 3, lines 30-32, Davies states: "The holder can be positioned exactly where it is most convenient." In the final rejection, and with reference to column 2, lines 26-30 and column 3, lines 30-31 of Davies, the examiner argued that Davies "teaches that a scissors-like tool, which one of ordinary skill in the art can call a scissors, may be attached to any surface where it is convenient via a sheath in which the sheath allows access to the scissors."

Nielsen et al. patent 5,791,608, discloses and claims a paint brush holder or cover made of a porous, flexible sheet

material, having a plurality of folding panels or flaps folded as needed to wrap around a paint brush, the panels being releasably connected together by hook and loop fasteners. "The cover can be hand rinsed out periodically with soap and water." (Column 1, lines 44, 45) Magnetic patches or inserts 22 in pockets formed in the fabric material are used to magnetically attract and attach the cover vertically or horizontally on most metal surfaces, "such as pick-up truck side walls, van side walls and ceilings, metal shop siding, and metal tool box lids and sides. In addition, brushes can be arranged on the inside or outside of metal paint buckets and pails." (Column 1, lines 31-37)

In the "Summary of the Invention," at column 1, lines 48-50, Neilsen et al. state: "The covers may also be used to store and protect many types of hand tools in the same manner as described herein."

At column 2, lines 19 through 35, Nielsen et al. suggest numerous uses for an "alternate embodiment" of their invention, which is shown in FIG. 7, that comprises "flexible, solvent proof, magnetic strips fitted with powerful magnet inserts [40a or 42a] that are covered with fabric for metal finish protection, and can be used for holding various metal objects." (Column 2, lines 11-15) Thus, the "alternate embodiment" is essentially a

replacement for a strip of adhesive tape, using magnets instead of an adhesive to maintain the strip adhered to a metal surface. Nielsen et al. suggest using the "alternate embodiment" holder to hold large and small parts to the side of solvent tubs while cleaning, to hold hand tools attached to a vehicle's motor compartment, fender or undercarriage, to hold loose items such as nuts and bolts, or to keep "scissors, instruments, bobbins, gauges and other hand tools within reach" while keeping the operator's work space clear by attaching a holder to the front or side of a metal machine (such as a sewing machine). Beginning at column 2, line 30, Nielsen et al. state that the "device allows mobile repair services to store their most used tools and parts on accessible surfaces, such as pick-up side walls, van side walls and ceilings, metal tool box lids and sides, refrigerators, and washer and dryers without scratching or marring surfaces."

Significantly, neither Davies or Neilsen et al. disclose or suggest a can opening appliance having a scissors holder.

The evidence patents, United States Patent No. 5,494,176 to Zallo shows an cutlery set holder fixed to a cabinet for holding several knives and suggests nothing of interest relative to the invention claimed herein. United States Patent No. 2,720,189 to Newman shows a variety of devices suitable for placing on an

office desk which include grooves for a scissors and a letter opener. The evidence patents likewise do not suggest a can opener with a scissors holder.

2. Claims 3 and 7 are not unpatentable over Presto in view of Davies and Nielsen et al. and in view of Zallo and Newman.

Independent claims 3 and 7 each recites, inter alia, a household opening appliance including an electric can opener [16, 18] having a housing [16], a sheath [50] for a scissors on the back of the housing [16], and a scissors holder [58] within the sheath [50]. (Reference numbers added.)

The prior art, Presto, Davies, Nielsen et al., Zallo, and Newman fail to suggest any reason for producing the claimed opening appliance, or any reason for combining their teachings and producing any particular appliance.

The Davies and the Nielsen et al. devices could be attached to a suitable support. However, that does not mean that it would be obvious to use every available, or even suitable, surface as a support. In order for the rejection of claims 3 and 7 to be proper, there must be a suggestion in the prior art or other sound reasons other than that would render it obvious for the skilled artisan to modify specifically a can opener by providing a sheath

on a can opener housing and providing a scissors holder within the sheath. The prior art relied upon by the examiner is devoid of such a teaching and the examiner has not presented sound reasons which would explain why it would occur to an skilled artisan to consider combining the teachings of the references.

The issue in this case should be resolved in appellant's favor by reasoning employed by the Board in its opinion of May 20, 2002, in Ex Parte Martin Brady, Appeal No. 2001-1477. The same Presto reference involved in the instant appeal was the primary reference in the earlier appeal. After noting that a scissors-holding sheath shown in a secondary reference could be attached to any suitable support, the Board, on page 5, stated "but we fail to perceive any teaching, suggestion or incentive in the applied references which would have motivated an artisan to attach" the devices of the secondary references considered by the Board at that time "to the housing of an electric can opener, such as that of Presto." Such a motivation is also lacking in the references now relied upon by the examiner. On page 6, the Board found that "...the only suggestion for putting the selected pieces from the" references then applied by the examiner "together in the manner proposed by the examiner is found in the luxury of hindsight accorded one who first viewed the appellant's

disclosure. This, of course, is not a proper basis for a rejection. See In re Fritch, 972 F.2d 1260, 1266, 23 USPQ 2d 1780, 1784 (Fed. Cir. 1992)." The same finding should be made with respect to the references now applied by the examiner. Counsel recognizes that the Supreme Court in KSR International Co. v. Teleflex, Inc., 127 S.Ct. 1727 (2007), cautioned against overemphasizing the "risk of courts and patent examiners falling prey to hindsight bias" and suggested the exercise of common sense. Common sense in this case does not lead to a suggestion for combining the diverse references on which the examiner has relied.

3. Claims 10 and 12 are not unpatentable over Presto in view of Davies and Nielsen et al. and in view of Zallo and Newman.

Independent claim 10 recites: "A household opening appliance comprising" (1) "an electric can opener [16, 18] having a housing [16]" and (2) "a scissors holder [58] on said housing capable of releasably retaining a scissors on said housing." (Reference numbers added)

The prior art, Presto, Davies, Nielsen et al., Zallo, and Newman fail to suggest any reason for producing the claimed opening appliance, or any reason for combining their teachings

and producing any particular appliance.

The Davies and the Nielsen et al. devices could be attached to any suitable support. However, that does not mean that it would be obvious to use every available, or even suitable, surface as a support. In order for the rejection of claims 10 and 12 to be proper, there must be a suggestion in the prior art that would render it obvious for a skilled artisan to modify specifically a can opener by providing a scissors holder on the can opener housing capable of releasably retaining a scissors on the housing. The prior art relied upon by the examiner is devoid of such a teaching.

The issue in this case should be resolved in appellant's favor by reasoning employed by the Board in its opinion of May 20, 2002, in Ex Parte Martin Brady, Appeal No. 2001-1477. The same Presto reference involved in the instant appeal was the primary reference in the earlier appeal. After noting that a scissors-holding sheath shown in a secondary reference could be attached to any suitable support, the Board, on page 5, stated "but we fail to perceive any teaching, suggestion or incentive in the applied references which would have motivated an artisan to attach" the devices of the secondary references considered by the Board at that time "to the housing of an electric can opener,

such as that of Presto." Such a motivation is also lacking in the references now relied upon by the examiner. On page 6, the Board found that "...the only suggestion for putting the selected pieces from the" references then applied by the examiner "together in the manner proposed by the examiner is found in the luxury of hindsight accorded one who first viewed the appellant's disclosure. This, of course, is not a proper basis for a rejection. See In re Fritch, 972 F.2d 1260, 1266, 23 USPQ 2d 1780, 1784 (Fed. Cir. 1992)." The same finding should be made with respect to the references now applied by the examiner.

Counsel recognizes that the Supreme Court in KSR International Co. v. Teleflex Inc., 127 S.Ct. 1727 (2007), cautioned against overemphasizing the "risk of courts and patent examiners falling prey to hindsight bias" and suggested the exercise of common sense. Common sense in this case does not lead to a suggestion for combining the diverse references on which the examiner has relied in this case.

Claim 12 depends on claim 10 and recites a jar opener mounted on the bottom wall of housing, and should be allowable along with claim 10.

4. Claims 11 and 13 are not unpatentable over Presto in view of Davies and Nielsen et al. and in view of Zallo and Newman.

Claims 11 and 13 include the subject matter of claim independent claim 10, namely: "A household opening appliance comprising" (1) "an electric can opener [16, 18]having a housing (16)" and (2) "a scissors holder [58] on said housing [16] capable of releasably retaining a scissors on said housing [16]."

Claims 11 and 13 additionally recite "a sheath [50] for a scissors on said housing." (Reference numbers added)

The prior art, Presto, Davies, Nielsen et al., Zallo, and Newman fail to suggest any reason for producing the claimed opening appliance, or any reason for combining their teachings and producing any particular appliance.

The Davies and the Nielsen et al. devices could be attached to any suitable support. However, that does not mean that it would be obvious to use every available, or even suitable, surface as a support. In order for the rejection of claims 10 and 12 to be proper, there must be a suggestion in the prior art that would render it obvious for a skilled artisan to modify specifically a can opener by providing a scissors holder on the can opener housing capable of releasably retaining a scissors on the housing and providing a sheath for a scissors on the can

opener housing. The prior art relied upon by the examiner is devoid of such a teaching.

The issue in this case should be resolved in appellant's favor by reasoning employed by the Board in its opinion of May 20, 2002, in Ex Parte Martin Brady, Appeal No. 2001-1477. The same Presto reference involved in the instant appeal was the primary reference in the earlier appeal. After noting that a scissors-holding sheath shown in a secondary reference could be attached to any suitable support, the Board, on page 5, stated "but we fail to perceive any teaching, suggestion or incentive in the applied references which would have motivated an artisan to attach" the devices of the secondary references considered by the Board at that time "to the housing of an electric can opener, such as that of Presto." Such a motivation is also lacking in the references now relied upon by the examiner. On page 6, the Board found that "...the only suggestion for putting the selected pieces from the" references then applied by the examiner "together in the manner proposed by the examiner is found in the luxury of hindsight accorded one who first viewed the appellant's disclosure. This, of course, is not a proper basis for a rejection. See In re Fritch, 972 F.2d 1260, 1266, 23 USPQ 2d 1780, 1784 (Fed. Cir. 1992)." The same finding should be made

with respect to the references now applied by the examiner.

Counsel recognizes that the Supreme Court in KSR International Co. v. Teleflex Inc., 127 S.Ct. 1727 (2007) cautioned against overemphasizing the "risk of courts and patent examiners falling prey to hindsight bias" and suggested the exercise of common sense. Common sense in this case does not lead to a suggestion for combining the diverse references on which the examiner has relied.

D. Claims 3, 7 and 10 through 13 of this application are not unpatentable under 35 U.S.C. §103(a) over a manual titled "PRESTO Under Cabinet Automatic Can Opener Plus" (National Presto Industries, Inc. 1989), in view of United States Patent No. 2,720,189, to Newman.

1. The Prior Art.

The primary reference is the Presto manual, also identified in the record of this application as "Ref. AU," titled "Under Cabinet Automatic Can Opener Plus," and hereafter called "Presto." Among other things, Presto describes and shows the operation of a jar opener recessed in the bottom of a can opener housing. See page 8 and Fig. J of Presto, which shows an electric can opener for domestic use having a jar opener.

The secondary reference, United States Patent No. 2,720,189, granted to Newman on October 11, 1956, discloses a variety of desk accessories including grooves for a scissors and a paper weight. The various accessories have various other purposes, including holding paper or pens or serving as a paper weight.

2. Claims 3 and 7 are not unpatentable over Presto in view of Newman.

Independent claims 3 and 7 each recites, inter alia, a household opening appliance including an electric can opener [16, 18] having a housing [16], a sheath [50] for a scissors on the back of the housing [16], and a scissors holder [58] within the sheath [50]. (Reference numbers added.)

The prior art, Presto and Newman fail to suggest any reason for producing the claimed opening appliance, or any reason for combining their teachings and producing any particular appliance. The Newman devices are merely movably positioned on a desk top with nothing to attach them to anything. There is no suggestion in either reference for a sheath on the back of a housing. In fact there is little or nothing that could result from any combination of Presto and Newman that would resemble the claimed invention.

This is not a situation in which the decision in KSR International Co. v. Teleflex Inc., 127 S.Ct. 1727 (2007), has any bearing.

3. Claims 10 and 12 are not unpatentable over Presto in view of Newman.

Independent claim 10 recites: "A household opening appliance comprising" (1) "an electric can opener [16, 18] having a housing [16]" and (2) "a scissors holder [58] on said housing capable of releasably retaining a scissors on said housing." (Reference numbers added)

The prior art, Presto and Newman fail to suggest any reason for producing the claimed opening appliance, or any reason for combining their teachings and producing any particular appliance. It is an extreme stretch to suggest that any of the Newman devised could be supported by a can opener, and a further stretch to suggest that common sense or any other reason suggests that one of the Newman devices be supported by a can opener.

Claim 12 depends on claim 10 and recites a jar opener mounted on the bottom wall of housing, and should be allowable along with claim 10.

4. Claims 11 and 13 are not unpatentable over Presto in view of Newman

Claims 11 and 13 include the subject matter of claim independent claim 10, namely: "A household opening appliance comprising" (1) "an electric can opener [16, 18]having a housing (16)" and (2) "a scissors holder [58] on said housing [16]

capable of releasably retaining a scissors on said housing [16]."
Claims 11 and 13 additionally recite "a sheath [50] for a
scissors on said housing." (Reference numbers added)

The prior art, Presto and Newman fail to suggest any reason
for producing the claimed opening appliance, or any reason for
combining their teachings and producing any particular appliance.
The Newman devices are merely movably positioned on a desk top
with nothing to attach them to anything. There is no suggestion
in either reference for a sheath on a can opener housing. If
fact there is little or nothing that could result from any
combination of Presto and Newman that would resemble the claimed
invention.

This is not a situation in which the decision in KSR
International Co. v. Teleflex Inc. has any bearing.

D. Claim 10 of this application is not unpatentable under 35 U.S.C. §103(a) over a manual titled "PRESTO Under Cabinet Automatic Can Opener Plus" (National Presto Industries, Inc. 1989), in view of United States Patent No. 6,253,662 to Zelson.

Independent claim 10 recites: "A household opening appliance comprising" (1) "an electric can opener [16, 18] having a housing [16]" and (2) "a scissors holder [58] on said housing [16] capable of releasably retaining a scissors on said housing [16]." (Reference numbers added)

The primary reference is the Presto manual, also identified in the record of this application as "Ref. AU," titled "Under Cabinet Automatic Can Opener Plus," and hereafter called "Presto." Presto describes and shows the operation of a can opener for domestic use which has a housing.

Presto does not show or suggest "a scissors holder on said housing capable of releasably retaining a scissors on said housing."

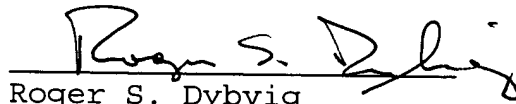
The secondary reference, United States Patent No. 6,253,662 to Zelson (hereafter called "Zelson") discloses embodiments of an electric, drip-type coffee maker having a housing and having a drawer for holding coffee filters. Zelson does not show or

suggest a scissors holder on a can opener. There is no suggestion in Presto or in Zelson of any reason for combining their teachings, and no suggestion of any structure that might result from combining their teachings. Again, the examiner has engaged in hindsight analysis to manufacture an implausible rejection. This rejection should also be reversed based on the reasoning of In re Fritch, 972 F.2d 1260, 1266, 23 USPQ 2d 1780, 1784 (Fed. Cir. 1992). It should also be noted that adding a drawer under the Presto can opener would render its jar opener unusable and for this reason alone, a skilled artisan would not consider modifying Presto in view of Zelson.

CONCLUSION

For the foregoing reasons, the examiner's action in finally rejecting claims 3, 7, and 10-13 should be reversed.

Respectfully submitted,


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Martin Brady et al.
Serial No. 09/228,109

VIII. Claims Appendix

3. A household opening appliance comprising an electric can opener having a housing, a jar opener mounted on the bottom wall of said housing, a sheath for a scissors on the back of said housing, and a scissors holder within said sheath.

4. A household opening appliance comprising an electric can opening having a housing, a jar opener mounted on the bottom wall of said housing, and a sheath for a scissors on the back of said housing, said sheath being formed by the back wall of said housing and a cover member connected to said back wall.

5. The appliance of claim 4 further comprising a scissors holder within said sheath, said scissors holder comprising a clamp formed from a first clamp member mounted on said back wall and a second clamp member mounted on said cover member.

7. A household opening appliance comprising an electric can opener having a housing, a sheath for a scissors on the back of said housing, and a scissors holder within said sheath.

8. A household opening appliance comprising an electric can opener having a housing, and a sheath for a scissors on the back of said housing said sheath being formed by the back wall of said housing and a cover member connected to said back wall.

Martin Brady et al.
Serial No. 09/228,109

IX. EVIDENCE APPENDIX

There is no evidence.

X. RELATED PROCEEDINGS APPENDIX

The following documents are attached hereto:

1. A copy of this Board's decision dated May 20, 2002, in an earlier appeal in this application, Ex parte Martin Brady, Appeal No. 2001-1477; and
2. A copy of this Board's decision, dated August 23, 2002, granting a Request for Rehearing in the above identified Appeal No. 2001-1477; and
3. A copy of a decision by Frederick R. Schmidt, Director for Technology Center 3700, dated September 25, 2007, dismissing a Petition to Withdraw Drawing Objection.

The opinion in support of the decision being entered today was not written
for publication and is not binding precedent of the Board.

Paper No. 14

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte MARTIN BRADY

Appeal No. 2001-1477
Application No. 09/228,109

ON BRIEF

MAILED

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**PAT. & T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES**

Before COHEN, ABRAMS and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 10-13.
Claims 3-5 and 7-9, the only other claims pending in this application, stand allowed.

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MAY 23 2002

**DYBVIK & DYBVIK
DAYTON, OHIO**

BACKGROUND

The appellant's invention relates to a household kitchen opening appliance, particularly for opening cans, jars, bottles or bags (specification, page 1). Claim 10, the sole independent claim on appeal, reads as follows.

10. A household opening appliance comprising an electric can opener having a housing and a scissors holder on said housing capable of releasably retaining a scissors on said housing.

The examiner relied upon the following prior art references of record in rejecting the appealed claims:

Rauh	2,027,785	Jan. 14, 1936
O'Bannon	3,730,391	May 1, 1973
Hoover et al. (Hoover)	4,984,368	Jan. 15, 1991

"PRESTO® Under Cabinet Automatic Can Opener Plus" manual (Presto) (National Presto Industries, Inc. 1989).

The following rejections are before us for review.

Claim 10 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Presto.

Claim 10 stands rejected under 35 U.S.C. § 102(b) as being anticipated by O'Bannon.

Claims 10-13 stand rejected under 35 U.S.C. § 103 as being unpatentable over Presto in view of Hoover and Rauh.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper No. 13) for the examiner's complete reasoning in support of the rejections and to the brief (Paper No. 12) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims,¹ to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

In rejecting claim 10 as being anticipated by Presto and as being anticipated by O'Bannon, the examiner's position, in essence, appears to be that the flat upper ledge on the housing of the Presto can opener extending forwardly of the mounting bracket and the rear upper horizontal surface of the projecting housing portion 16 of O'Bannon are capable of holding, in the sense of supporting, a scissors and, thus, respond structurally to the "scissors holder" recited in claim 10. In reaching this determination, the examiner notes that an accepted meaning of "hold" is "to support or keep from falling or moving" (answer, page 3).

¹ Claims 11 and 13 contain an error, in that, consistent with appellant's disclosure, the sheath is a more specific recitation of the scissors holder, not a distinct element in addition to the scissors holder. Therefore, claims 11 and 13 should be amended to change "further" to --, the scissors holder--.

To anticipate, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim. Karsten Mfg. Corp. v. Cleveland Golf Co., 242 F.3d 1376, 1383, 58 USPQ2d 1286, 1291 (Fed. Cir. 2001); Scripps Clinic & Research Foundation v. Genentech, Inc., 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991).

While the flat horizontal surfaces of the Presto and O'Bannon can opener housings indeed appear capable of providing vertical support for a scissors, claim 10 requires more than this. Specifically, claim 10 calls for a scissors holder which is "capable of releasably retaining a scissors on said housing."² The flat horizontal surfaces of Presto and O'Bannon alluded to by the examiner lack the requisite structure to releasably retain a scissors on the housing and we do not find any structure on the housing of either the Presto or O'Bannon can opener which appears reasonably capable of performing such function. As neither Presto nor O'Bannon discloses each and every element and limitation of claim 10, the examiner's anticipation rejections of claim 10 cannot be sustained.

The examiner has also rejected claim 10, as well as claims 11-13 which depend from claim 10, as being unpatentable over Presto in view of Hoover and Rauh. Hoover discloses an emergency scissors for cutting through a jammed seat belt of a motor

² Appellant's disclosed structure for performing this function, as illustrated in Figure 3 and discussed in the paragraph bridging pages 5 and 6 of appellant's specification, comprises a sheath 50 formed by the rear wall of the housing and a cover member 54, the sheath being provided with a pair of cooperating spring metal clamp members 60, 62 for releasably retaining the scissors 52 within the sheath.

vehicle, a sheath 28 having a pouch 30 for storing the scissors when not in use and hook and loop fastener elements for attaching the sheath 28 to an interior surface 32, such as a dashboard of a motor vehicle. Rauh discloses conventional shears provided with a hook element 15 on the bow thereof for removing crimped-on bottle caps, as illustrated in Figure 3. The examiner's position in making the rejection, as set forth on page 4 of the answer, is as follows:

The Presto can opener shows a combination device that includes a bag opener and can opener. Combinations of cutters and jar openers, ie. scissors and bottle openers, are old as shown by Rauh. The advantage of this combination device over the Presto device is that it can cut more than bags. The problem is how to attach it to a can opener. The answer is supplied by Hoover et al. who shows a sheath style nonuse support. The sheath would obviously hold the scissors to any suitable support. Thus it would have been obvious to one of ordinary skill in the art at the time the invention was made to equip the Presto can opener with a sheath as shown by Hoover to hold the scissor/opener of Rauh. Obviously then the slitter and jar opener of the [P]resto can opener would be unnecessary. The motivation would be obviously to produce a more versatile device.

We share the examiner's view that the sheath taught by Hoover *could* be attached to any suitable support, but we fail to perceive any teaching, suggestion or incentive in the applied references which would have motivated an artisan to attach either the shear/bottle opener utensil of Rauh or the sheath taught by Hoover to the housing of an electric can opener, such as that of Presto. Even assuming the examiner is correct that the combination of the Rauh utensil with the Presto can opener would

yield a more versatile device³, the applied references are devoid of any recognition of such a versatility advantage from the proposed combination. From our perspective, the only suggestion for putting the selected pieces from the references together in the manner proposed by the examiner is found in the luxury of hindsight accorded one who first viewed the appellant's disclosure. This, of course, is not a proper basis for a rejection. See In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992).

In light of the foregoing, we conclude that the combined teachings of Presto, Hoover and Rauh are insufficient to suggest the subject matter of claims 10-13. Thus, we shall not sustain the examiner's rejection of these claims under 35 U.S.C. § 103.

³ The Presto can opener, with its can, bottle, bag and jar opening equipment is already quite versatile and it is not apparent to us that the addition of a shear/bottle opener would provide any further advantage or versatility in opening items.

CONCLUSION

To summarize, the decision of the examiner to reject claim 10 under 35 U.S.C. § 102(b) and claims 10-13 under 35 U.S.C. § 103 is reversed.

REVERSED



IRWIN CHARLES COHEN
Administrative Patent Judge



NEAL E. ABRAMS
Administrative Patent Judge



JENNIFER D. BAHR
Administrative Patent Judge

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Appeal No. 2001-1477
Application No. 09/228,109

Page 8

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Dayton, OH 45402



The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

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AUG 23 2002

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BOARD OF PATENT APPEALS
AND INTERFERENCES

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARTIN BRADY

Appeal No. 2001-1477
Application No. 09/228,109

ON BRIEF

Before COHEN, ABRAMS and BAHR, Administrative Patent Judges.

BAHR, Administrative Patent Judge.

ON REQUEST FOR REHEARING

This is a decision in response to appellant's request for rehearing (Paper No. 15) of our decision mailed May 20, 2002 (Paper No. 14) reversing the rejections of claim 10 under 35 U.S.C. § 102 and the rejection of claims 10-13 under 35 U.S.C. § 103. Appellant does not take issue with our decision to reverse these rejections, but does request that we modify our decision by removing footnote 1 on page 3 of that decision, which reads:

Claims 11 and 13 contain an error, in that, consistent with appellant's disclosure, the sheath is a more specific

recitation of the scissors holder, not a distinct element in addition to the scissors holder. Therefore, claims 11 and 13 should be amended to change "further" to --, the scissors holder--.

Appellant's position, in essence, is that, while the sheath 50 could have been characterized as being a part of the scissors holder 58¹, appellant's specification, on page 5, describes the scissors holder or clamp 58 as comprising a pair of cooperating spring metal clamp members 60 and 62. Although the clamp member 62 of the scissors holder 58 is mounted on the cover member 54 which forms the sheath 50, we recognize that the terminology of the specification does not include the sheath as part of the scissors holder. Accordingly, upon reconsideration, we share appellant's view that claims 11 and 13 are, in fact, consistent with the terminology of appellant's specification.

¹ Note, in fact, that the clamp member 62 of the scissors holder 58 is mounted on the sheath 50 and, thus, requires the sheath 50 for assembly on the housing 16 of the appliance 10 so that it can achieve its scissors holding or retaining function.

In light of the above, appellant's request for rehearing is GRANTED, in that we hereby modify our earlier decision by removing footnote 1 on page 3 thereof. No other change is made to the earlier decision. The rejections of claim 10 under 35 U.S.C. § 102 and claims 10-13 under 35 U.S.C. § 103 remain reversed.

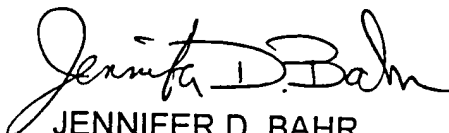
GRANTED



IRWIN CHARLES COHEN
Administrative Patent Judge



NEAL E. ABRAMS
Administrative Patent Judge



JENNIFER D. BAHR
Administrative Patent Judge

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Appeal No. 2001-1477
Application No. 09/228,109

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9/25/07

In re Application of:
MARTIN BRADY, et al.
Serial No.: 09/228109
Filed: Jan. 11, 1999
Docket: 0166
Title: UNIVERSAL CLEAT

DECISION ON PETITION
TO WITHDRAW DRAWING
OBJECTION

This is a decision on the petition filed on July 25, 2007 seeking reversal of the drawing objection under 37 CFR 1.83(a). The petition is being considered pursuant to 37 CFR 1.181. No fee is required.

The petition is **DISMISSED**.

In the petition, the petitioner requests a review of the examiner's objection to the drawings under 37 CFR 1.83(a). The examiner objected to the drawing on the grounds that "the housing comprising a holder and a sheath" recited in claims 11 and 13 were not illustrated. Petitioner believes that the objection to the drawings is in error and requests review and relief therefrom.

The record shows that:

1) In a Non-Final Rejection on October 11, 2006, Examiner rejected claims 11 and 13 under 35 U.S.C. 112, second paragraph, because the phrase "a sheath" was unclear (Page 4). Examiner states, "It is unclear if claims 11 and 13 intended for the "scissors holder" to further comprise a sheath or if the term "a sheath" represents an additional structure.

2) Applicants responded on March 12, 2007 stating that claims 11 and 13, "adequately define the invention to one who is familiar with the disclosure." Applicants emphasized that the application, "was thoroughly and repeatedly examined" before Examiner raised the current 35 U.S.C. 112 rejection towards claims 11 and 13.

3) On May 25, 2007, Examiner issued a Final Rejection, objecting to the drawing on the grounds, "The drawings must show every feature of the invention specified in the

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DAYTON, OHIO

claims... 'the housing comprising a holder and a sheath', of claims 11 and 13, must be shown or the feature(s) canceled from the claim(s)... " (Page 2). Examiner repeated that claims 11 and 13 were rejected under 35 U.S.C. 112, second paragraph, because the phrase "a sheath" was unclear (Page 3).

4) On Jul. 25, 2007, the current petition seeking withdrawal of the drawing objection under 37 CFR § 1.83(a)¹ was filed.

Discussion and Analysis

A review of the record indicates that the drawing objection and claim rejection are directed to the same issues. In the final Office action of May 25, 2005, the rejection of claims 11 and 13 under 35 USC 112, 2nd Paragraph, the examiner stated the phrase "a sheath" is not clear. The examiner also objected to the drawing that the subject matter of claims 11 and 13 is not shown by the original drawings. That is, the correctness of Examiner's drawing objection, resting on the lack of clarity of, 'the housing comprising a holder and a sheath,' is dependent on the correctness of Examiner's 35 USC 112 rejection of claims 11 and 13 based on the phrase "a sheath." It is the policy of the USPTO in appropriate circumstances to decline to rule on a petitionable issue, when, as here, that an issue is also determinative of a rejection, and as such, is appropriate for consideration on appeal to the BPAI. In this case, the issue in the objection and rejection, as here, additionally and necessarily requires the exercise of technical skill and legal judgment in order to evaluate the facts presented, the issue is properly decided on the merits, and is properly reviewed on appeal, not petition. Under the circumstances, it is believed that the issues presented under the claim rejections and drawing objection in the instant case require the same review by the BPAI. Thus, this issue is appealable and should not be decided by petition.

Conclusion

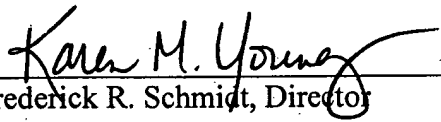
For the foregoing reasons, the relief requested by the petitioner will not be granted. Because there is both an objection to drawings under 37 CFR 1.83(a) and a rejection to claims 11 and 13 under 35 USC 112, 2nd paragraph, and both the correctness of the objection and the rejection depend on the same issue, the issue is an appealable one and will not be decided by petition.

The application is being forwarded to Supervisory Patent Examiner of Art Unit 3724 for further processing. Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision, 37 CFR 1.181(f). No

¹ § 1.83 Content of drawing. (a) The drawing in a nonprovisional application must show every feature of the invention specified in the claims. However, conventional features disclosed in the description and claims, where their detailed illustration is not essential for a proper understanding of the invention, should be illustrated in the drawing in the form of a graphical drawing symbol or a labeled representation (e.g., a labeled rectangular box). In addition, tables and sequence listings that are included in the specification are, except for applications filed under 35 U.S.C. 371, not permitted to be included in the drawings.

extension of time under 37 CFR 1.136(a) is permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181". Any inquiry regarding this decision should be directed to Marc Jimenez, Training Quality Assurance Specialist, at (571) 272-4530.

PETITION DISMISSED

for 

Frederick R. Schmidt, Director
Technology Center 3700